



Common Misunderstandings Regarding Wisconsin Pooled and Community Trusts (WisPACT)

Special needs trusts (and sometimes referred to as supplemental needs trusts) are a rare type of trust that remains exempt from MA and SSI counting rules when properly created and administered.

WisPACT is a not-for-profit organization that manages these types of trust. The WisPACT program currently administers approximately 1,800 trusts and the program continues to grow. Familiarity with the trusts within the program and the rules around them can relieve a great amount of confusion when processing them. Attached are explanations regarding common issues experienced when these types of trust are processed for MA reasons.

WisPACT only has a pooled trust

Not true. WisPACT administers three types trusts – 2 types of self-funded exempt trusts and an exempt trust funded with assets of third parties. The easiest way to identify what type of trust you are looking at is to look at the title of the WisPACT Contribution Agreement. To be clear, a trust only needs to meet one of these three types to be exempt and *not* all three simultaneously. To be more specific about how WisPACT trusts are defined under these classifications, they are as follows:

- a. WisPACT Trust I – These are all self-funded trusts and are called Pooled Trusts. They can also be called a special needs trust or d4C trust (named cleverly after the corresponding federal legislation). However, these trusts receive federal legislative authorization that carries some very specific differences than traditional special needs trusts. Amongst these are the ability for individuals over the age of 64 to create their own trust and that the pooled trust can possibly retain assets upon the death of the beneficiary. In the Medicaid Eligibility Handbook (MEH), these trusts can be found in 16.6.6.
- b. WisPACT Trust II – There are two types of trusts within this trust program. What determines the type of trust is the source that the assets come from.
 - i. Self-Funded WisPACT Trust II – These trusts contain assets of the beneficiary. For this reason, the trust must be treated like a traditional special needs trust. These are also called a standalone trust, special needs trust, or d4A trust (again, named after its authorizing federal legislation). Because this type of trust is generally more restrictive in nature, it will be uncommon to see a self-funded WisPACT Trust II. In the MEH, these trusts can be found in 16.6.5.
 - ii. Third Party Funded WisPACT Trust II – These trusts contain assets of third parties. There are absolutely no assets belonging to the beneficiary within these trusts. Other names for these types of trusts are third party trusts or special needs trusts. These trusts may be funded immediately or in a future date, such as after the death of a loved one. In the MEH, these trusts can be found in MEH 16.6.4.1

This beneficiary is over 64 years old and can't create an exempt trust.



Not true. As said earlier, WisPACT Trust I's are authorized by a slightly different law. Self-funded exempt trusts are authorized by 42 U.S.C. § 1396p(d)(4). Standalone self-funded trusts are specifically authorized by § 1396p(d)(4)(A). This law expressly states that these exempt trusts are available only to individuals who are under 65 years of age. However, pooled trusts are authorized specifically by 42 U.S.C. § 1396p(d)(4)(C). This law does not express any age limitation. In Wisconsin, this is interpreted as specific intent by Congress to impose only an age limitation on trusts created under (d)(4)(A). (See January 22, 2009 Timberlake letter addressed to WisPACT). For these reasons, an exempt pooled trust, such as WisPACT Trust I sub-account, can be created by an individual over 64.

Because this individual is over 64 years old, they do not need to have a disability determination.

Not necessarily true. While the age of 65 is a great short cut for determining MA eligibility, it does nothing to resolve the issue of making an asset exempt. A special needs trust may be created with the end goal of creating a means of MA eligibility, but it only does that by making it financially possible. In other words, for an individual to ultimately be eligible for MA services, he/she must first have their trust treated as exempt.

In order for the trust to be an exempt asset, the individual must be determined disabled by the appropriate agency. In Wisconsin, this is either the Social Security Administration (SSA) or the Disability Determination Bureau (DDB).

The confusion arises when an elderly individual seeks MA eligibility by utilizing a special needs trust, but has never received a disability based benefit from SSA or MA. Until this point, the individual has never had a disability determination and will need one now to make the trust exempt. In this situation, the only agency that can make this determination is the DDB. For this reason, the application with the DDB must be filed in order to make the trust an exempt asset and subsequently cause MA eligibility.

Fortunately, there are multiple resources in the MEH and a fair hearing ruling to help clarify this issue. The note in MEH 16.6.6 suggests that a DDB determination and/or application are necessary to make the trust exempted. Also, MEH 5.4 directs people to a contact regarding any confusion in procedural policy. Finally, the Fair Hearing's Final Decision can be referenced to resolve any further confusion on this issue. *Final Decision*, DHA Case No. MDV 38/87937 (Wis. Div of Hearings & Appeals June 9, 2008).